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Mahendra Agarwal Vs. Union of India & Others

IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT
JODHPUR

: O R D E R :

Mahendra Agarwal Vs. Union of India & Others.
(S.B. Civil Writ Petition No.377/2001)

DATE OF ORDER : May 28, 2007

P R E S E N T

Hon'ble Mr. Justice Gopal Krishan Vyas

Mr. Sunil Bhandari for Mr. Anjay Kothari for petitioner.
Mr. K.K. Bissa for respondent(s).

BY THE COURT :

By this writ petition, the petitioner is challenging the order of attachment Annex.-7 passed by the Income Tax Recovery Officer, udaipur under Rule 48 of the Second Schedule appended to the Income Tax Act 1961.

According to facts narrated in the writ petition, the petitioner was Director on the Board of Directors of M/s Kedia Continental Ltd., Bhilwara and he resigned from the Board of Directors of the said company with effect from 15.12.1997 and shifted to Bombay. According to the petitioner, copy of

prescribed form No.32 under the Companies Act 1956 was sent to the Registrar of the Companies, Rajasthan, Jaipur. It is also stated in the petition that an intimation in this regard was also sent to the company vide letter dated 02.12.1997 by the petitioner. He has placed on record copy of the letter which was dispatched by registered post on 29.12.1997. It is submitted that after 15.12.1997 the petitioner was no more Director of the company and he did not have any relationship with the company as its director.

In this case, the petitioner received impugned order dated 21.12.2000 passed by respondent No.2 attaching his residential house situated at D-34, Basant Vihar, Bhilwara on account of alleged failure to pay the dues by respondent No.3 company. The said order is purportedly passed invoking Section 179 of the Income Tax Act. The crux of the contention of the petitioner in this writ petition is that the impugned order is ex facie illegal and without jurisdiction as the petitioner cannot be held personally for payment of dues of the company which is a public-limited company.

It is contended by learned counsel for the petitioner that the petitioner merely held a fiduciary position on the board of directors of the said company under the mandate of share-

holders. According to him, under the Companies Act, 1956 the identity of share-gholders, company and directors is independent and the directors on the board are not owners of the company and, therefore, the petitioner is not liable for any recovery for non-payment of alleged dues by the company nor there is any allegation of fraud or collusion on the part of the petitioner and as such the petitioner denies all liabilities. It is also submitted that the petitioner was not served with any notice for demand or assessment order. The petitioner is not aware whether any assessment proceedings is pending against the company.

It is next contended by learned counsel for the petitioner that respondent No.3 company has its own assets and the respondent department can pursue the company for alleged recovery of dues under the Act. Learned counsel for the petitioner vehemently argued that according 6 to Section 2 of Schedule II, whereby procedure for recovery of tax dues is provided and it is incumbent upon the recovery officer that he should give notice to the defaulter requiring the defaulter to pay the amount specified in the certificate within 15 days of the date of service of the notice. Section 2 of the Second Schedule of the Act is reproduced hereunder :

"2. Issue of notice.- When a certificate has been drawn up by the Tax Recovery Officer for the recovery of arrears under this Schedule, the Tax Recovery Officer shall cause to be served upon the defaulter a notice requiring the defaulter to pay the amount specified in the certificate within fifteen days from the date of service of the notice and intimating that in

default steps would be taken to realise the amount under this Schedule.”

It is further contended that no such notice was given to the petitioner. Likewise, after resignation from the post of Director he is not liable to pay any tax dues on behalf of the company nor it can be recovered from him. Hence Annex.-7 deserves to be quashed and set aside.

Learned counsel for the petitioner invited my attention towards judgment reported in AIR 2005 SC(W) 3727 and another judgment, reported in AIR 2006 SCW 6830, in which the Hon'ble Supreme Court has held that even writ petition against the notice is maintainable if the notice is issued without jurisdiction. Therefore, the preliminary objection raised by the respondents with regard to maintainability of the writ petition or to avail the alternate remedy is no bar because in this case the authority has acted without jurisdiction and in breach of the principle of natural justice. Learned counsel for the petitioner has also invited my attention towards the judgment reported in 195 ITR 873 (SC) in which it has been held that provisions of Section 179 are also applicable only against the Director of private company. It is submitted that the legislature has thus in its wisdom imposed a prohibition to effect recovery against Director of a public limited company because he is merely an employee of the company and the company itself is a separate

legal entity.

In the alternative, learned counsel for the petitioner also submitted that the order of attachment cannot be passed straight away without following due process of law which necessitates issuing notice under Rule 2, read with Rule 4 of Schedule – II and, therefore, the impugned order of attachment is clearly in flagrant violation of the principles of natural justice. It is further submitted that before proceeding against the Director for recovery finding has to be arrived at by the authority that the arrears of tax cannot be recovered from the company. In the absence of such finding the concerned assessing officer does not get jurisdiction. In this regard, reliance is placed on the judgment reported in (2002) 253 ITR 139 (Mad.) and (1998) 232 ITR 306 (A.P.). According to learned counsel for the petitioner, the attachment order passed by the Income Tax Recovery Officer is totally without jurisdiction and against the principles of natural justice, therefore, the same deserves to be quashed.

Learned counsel for the respondents firstly raised preliminary objection that the writ petition is not maintainable because there is remedy of appeal provided under the Act as per Section 86 against the order of attachment passed under Rule 48

of the Schedule – II passed by the Tax Recovery Officer. It is submitted that obviously Annex.-7 has been passed under Section 48 by the Income Tax Recovery Officer, Udaipur, therefore, this petition is not maintainable. It is further contended that when there is specific remedy provided under the statute, the petitioner cannot invoke the extraordinary jurisdiction of this Court under Articles 226 and 227 of the Constitution of India.

It is further submitted by learned counsel for the non-petitioner that this petition is against the order of attachment and before approaching this Court the petitioner was having opportunity to file representation before the Tax Recovery Officer; but, he has not filed any representation before the Tax Recovery Officer who has passed the order for attachment. It is also submitted that two directors of the company are very close relatives of the petitioner inasmuch as they are wife and brother-in-law of the petitioner. It is argued that even today the controlling authority of the assessee company is the petitioner and other are only dummy directors of the company. The petitioner has concealed many such facts which manifestly prove evasion of tax liability on the part of the petitioner. It is submitted by learned counsel for the respondents that despite

collection of funds through public issues the company is today in complete lurch and is badly facing financial crisis having no assets. It is argued that the petitioner having failed to approach this Court with clean hands is not entitled to invoke the extraordinary jurisdiction of this Court.

It is also submitted that the petitioner was also the Managing Director of the assessee company and under the Companies Act and for the purpose of income tax the company includes its directors and where the person is directly in control of the affairs of the company and is also its Managing Director he cannot shunt his responsibility for the payment of any income tax dues against the company.

It is submitted by learned counsel for the respondents that assessment of M/s Kedia Continental Ltd. of which the petitioner is a Director was completed under Section 144 of the Income Tax Act on 26.03.1999 at a total income of Rs.3,46,34,800/- and a tax demand of Rs.2,74,03,048/- was created. Against that order the assessee preferred appeal before the Commissioner of Income Tax (Appeal), Ajmer which was dismissed vide order dated 21.01.2000. Against the order of dismissal of the appeal, the assessee did not prefer any second appeal and thus the demand order dated 26.03.1999 became final. It is also

submitted that penalty proceedings was also initiated against the assessee company and penalty was imposed which was not challenged in any proceedings. In the circumstances, according to the learned counsel for the respondents, the impugned order has rightly been passed by the Tax Recovery Officer.

Learned counsel for the respondents next contended that the petitioner has brought forth nothing on record to show that respondent No.3 is public limited company and, therefore, the provisions of Section 179 are not applicable to it. According to learned counsel for the respondents, the petitioner is required to file direct proof of evidence to show that provisions of Section 179 of the Act are not attracted, however, the impugned order has been passed independently of the provisions of Section 179 of the Act. It is denied by counsel for the respondents that any letter dated 02.12.1997 alleged to have been sent by the petitioner was received or is on record with the department nor any resolution of the Board dated 15.12.1997 finds place on record. It is in dispute whether the petitioner resigned from the post of Director or not, so also, no information whatsoever was given to the department, therefore, while on the one hand the writ petition is not maintainable, on the other hand, there are disputed questions of fact which cannot be decided in exercise of

the jurisdiction vested in the Court under Article 226 of the Constitution of India.

I have considered the rival submissions and carefully scanned the material on record.

It is not disputed by the petitioner that appeal is provided under the statute vide Section 86(1) of the Act but the insistence of the petitioner for interference by this Court under Articles 226 and 227 of the Constitution is grounded on the contention that the order itself is totally without jurisdiction, therefore, the writ petition is maintainable and such order can be quashed by this Court. It is true that the apex Court has held in some cases that if order is without jurisdiction it can be challenged by way of filing writ petition before the High Court, however, the judgments cited by learned counsel for the petitioner are based on totally different facts of the case. In the judgment, reported in AIR 2005 SC(W) 3727, the State of Himachal Pradesh filed special leave to appeal before the Hon'ble Supreme Court challenging the order passed by the Sales Tax Authority and the revisional authority wherein the order of assessment was in question. Here, in this case, the order of assessment is not under challenge; but, it is order of attachment passed on the basis of final adjudication of the assessment upto appellate stage

against the company in which the petitioner was one of the Directors at the relevant time. Therefore, obviously the attachment order which is passed under Rule 48 of the Schedule-II appended to the Income Tax Act is an appealable order and appeal can be filed under Section 81(1) of Schedule – II of the Act. In this view of the matter, the judgment cited by learned counsel for the petitioner is not applicable to the facts of the case on hand.

Similarly, the other judgment reported in AIR 2006 SCW 6830 was in relation to the writ petition which was entertained against a show cause notice. The impugned order in the present case is not a notice to show cause but it is order of attachment for the purpose of recovery of tax dues against the company wherein the petitioner was himself Director at the relevant time. In these circumstances, this judgment is also not applicable to the facts of the present case. Order impugned Annex.-7 is passed under Rule 48 for attachment of the property which is admittedly appealable order under Section 86(1) of Schedule- II of the Income Tax Act, therefore, the contention of the petitioner with regard to maintainability of the writ petition cannot be accepted. There is thus force in the objection raised by learned counsel for the respondents to entertainment of the writ petition

in exercise of extraordinary jurisdiction of this Court.

With regard to Section 2 of the Second Schedule, it is obvious that if the petitioner is claiming that notice was required to be issued to him then obviously it is admitted position in the case that the petitioner is defaulter. On the one hand, the petitioner has advanced the contention that after 15.12.2000 he was no more Director of the Company and, therefore, was not liable towards the company for any of its dues. On the other hand, the petitioner has argued that notice was required to be issued under Section 2 of the Second Schedule; then, in these circumstances, against the said attachment order passed in pursuance of the assessment proceedings which attained finality, the remedy available to the petitioner is under Section 86(1) of the Act by way of filing appeal before the appellate authority. Otherwise also, the petitioner has raised contentions with regard to the order of attachment and argued that the same cannot be passed straight away without following due process of law which necessitates issuing notice under Rule 2, read with Rule 4 of Schedule – II and, therefore, the impugned order of attachment is clearly in flagrant violation of the principles of natural justice. It has also been contended that before proceeding against the Director for recovery, finding has to be arrived at by the

authority that the arrears of tax cannot be recovered from the company and, therefore, in the absence of such finding the concerned assessing officer does not get jurisdiction. Obviously, resolution of the issues raised by the petitioner in the writ petition directly involves resolution of disputed questions of fact and, as such, it is all the more necessary that the remedy available to the petitioner under the statute is taken recourse to. In their reply, the respondents have categorically denied having received any information with regard to the resignation of the petitioner from the post of Director. In this view of the matter, it cannot be said that the order impugned Annex.-7 is bad in the eye of law. In the circumstances, I see no reason to interfere with the order of attachment Annex.-7, which is appealable order under Section 86(1) of the Act.

Hence, this petition is dismissed while reserving liberty to the petitioner to approach the appellate authority as provided under Section 86(1) of the Act against the attachment order and, in the event, the petitioner files such an appeal within a period of 30 days from today, the appellate authority shall decide the same in accordance with law, after hearing the parties, within a period of two months thereafter.

(Gopal Krishan Vyas) J.